No. 94-1247 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1995

Supreme Court, U.S.
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HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

NIGHTTIME CONCEPTS, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

HOSPITALITY INVESTMENTS OF PHILADELPHIA, INC.,
Petitioner,

v.

PENNSYLVANIA STATE POLICE,
BUREAU OF LIQUOR CONTROL ENFORCEMENT,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

ARGUMENT

Petitioners submit this supplemental brief because of the dispositive impact of the Court's recent decision in *44 Liquormart v. Rhode Island*, No. 94-1140 (U.S. May

13, 1996), on the issues presented by this Petition. Under *44 Liquormart*, it is now clear that the Pennsylvania Supreme Court's reliance on the Twenty-first Amendment as the foundation for its analysis was erroneous. It is also clear that Pennsylvania's restriction cannot satisfy the *Central Hudson* * test for restrictions on commercial speech. Therefore, based on *44 Liquormart*, the Petition should be granted and the decision of the Supreme Court of Pennsylvania should be summarily reversed.

As noted in the Petition, the Pennsylvania Court found that a First Amendment challenge to a restriction on price advertising for alcohol beverages was governed primarily by the Twenty-first Amendment. *See* Petition at 8. Accordingly, the Pennsylvania Court discarded the "careful balancing" ordinarily required in First Amendment cases in favor of an unprecedented "reasonable relation" test. *Id.* In *44 Liquormart*, the Court has now unanimously rejected the notion that the Twenty-first Amendment operates to qualify First Amendment rights. Slip op. (Stevens, J.) at 30; slip op. (O'Connor, J.) at 6. In Part VII of the opinion, the Court held that "[t]he Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment." Slip op. (Stevens, J.) at 30. Justice O'Connor concurred, finding that "[n]othing in the Amendment's text or history justifies its use to alter the application of the First Amendment." Slip op. (O'Connor, J.) at 6. This resounding rejection of the fundamental premise of the Pennsylvania Court's decision leads to the inescapable conclusion that the Pennsylvania decision should now be reversed.

Reversal, not remand, is the appropriate remedy because *44 Liquormart* is directly on point. *44 Liquormart* involved

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* *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980).

a First Amendment challenge to Rhode Island's ban on price advertising of alcohol beverages. *See* slip op. (Stevens, J.) at 1. The purpose of the ban was to promote temperance by reducing consumption. *See id.* at 17-18. The Court in *44 Liquormart* held that the statute was unconstitutional because Rhode Island failed to satisfy its heavy burden of justifying the ban. *Id.* at 31. The burden imposed on the government is to demonstrate that the restriction directly advances the stated purpose of the statute to a material degree, in a manner no more extensive than necessary. *Id.* at 18-19. Justice Stevens, joined by three other justices, held that Rhode Island failed to submit any evidence to demonstrate that its statute would "*significantly* advance" Rhode Island's interest in promoting temperance. *Id.* at 19 (emphasis in original). In addition, both Justice Stevens in Part V of his opinion and Justice O'Connor in concurrence found that Rhode Island's statute was more extensive than necessary because Rhode Island ignored obvious alternative forms of regulation that would accomplish the goal of promoting temperance without restricting speech—alternatives such as educational programs. *Id.* at 21; slip op. (O'Connor, J.) at 3.

The Pennsylvania statute is nearly identical to the Rhode Island statute, and was also enacted for the purpose of reducing consumption of alcohol beverages. As in *44 Liquormart*, however, the government failed to demonstrate that the statute would directly advance that purpose in a manner no more extensive than necessary. *See* Petition at 20-21. The record here contains even less evidence of the impact of the statute on rates of consumption of alcohol beverages than the *44 Liquormart* record contained. *Id.* at 20. In fact, in the instant case the government presented *no evidence* to demonstrate that the statute caused a decrease in consumption rates and even argued to this Court that "no explicit evidentiary findings are needed." Brief in Opposition to Petition at 12. Moreover, the same obvious, alternative measures

for promoting temperance without restricting speech that were available to Rhode Island were available to the Pennsylvania legislature; yet there is no evidence that the Pennsylvania legislature even considered these options. In sum, the government has completely failed to satisfy its heavy burden. Accordingly, the Court should follow *44 Liquormart* and declare the Pennsylvania statute unconstitutional.

CONCLUSION

The decision in *44 Liquormart* makes plain that the Pennsylvania Court erred in relying on the Twenty-first Amendment to avoid a First Amendment analysis of Pennsylvania's statute. Moreover, the decision in *44 Liquormart* demonstrates that bans on price advertising, such as Pennsylvania's statute, are unconstitutional. The Petition should be granted and the judgment of the Supreme Court of Pennsylvania should be summarily reversed.

Respectfully submitted,

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